

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, Judge

DIVISION II

CACR 06-109

SEAN HICKS

March 14, 2007

APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF GARLAND COUNTY
[NO. CR-04-418-1]

V.

STATE OF ARKANSAS

HONORABLE JOHN HOMER
WRIGHT, JUDGE

APPELLEE

AFFIRMED

SARAH J. HEFFLEY, Judge

The appellant, Sean Hicks, was charged with first-degree murder for causing the death of Jerry Wayne Emory. In a jury trial, he was convicted of second-degree murder and sentenced to twenty years in prison. Appellant raises three issues on appeal. He contends: (1) that the evidence is not sufficient to support his conviction; (2) that the trial court erred in admitting a photograph of Emory into evidence; and (3) that the trial court erred in allowing his wife to testify as to privileged communications. Finding these arguments without merit, we affirm.

On April 21, 2004, the body of Jerry Emory was found on Faulkner Circle, which is off Amity Road in Garland County. Emory was lying next to a fence with a large pool of blood around his head. The fence was also stained with blood where Emory had fallen against it prior to his death. There were no weapons found at the scene other than a small pocket knife that was in Emory's pocket. The knife was photographed and placed in the body bag with Emory, but later it could not be located. A lighter which had blood on it was collected, and several rocks that had small amounts of blood on them were photographed. Photographs of the body were taken as well.

Appellant was developed as a suspect after the police interviewed Michael Burch, who came to the police department to volunteer information about the murder on May 4, 2004. The police also spoke with appellant's wife, Jodie Hicks. After her interview, a warrant was issued for appellant's arrest.

At trial, Michael Burch testified that he lived at a mission for the homeless in Hot Springs. He was acquainted with appellant and Jodie Hicks. He said they drank and took drugs together. On the night of May 3, 2004, Burch, appellant and Jodie were at the mission drinking whiskey and playing cards. Burch said appellant and Jodie were bickering and calling each other names, and that while they were arguing, Jodie blurted out, "Sean's a murderer." After appellant expressed disbelief about what Jodie had said, Jodie added, "That's right, he killed Jerry, the dope man." Burch said they left the mission because appellant and Jodie's argument grew too loud for them to stay there. While they were

driving, appellant offered more details about the murder. He told Burch that Emory owed him money that was needed for his and Jodie's baby. Appellant explained that he hit Emory in the head but thought he had only left him unconscious. Appellant claimed that it was an accident and that he had not meant to kill Emory.

Jodie Hicks testified that she and appellant knew Emory well and that they smoked marijuana and did crystal methamphetamine with him. On April 19, 2004, Emory had visited the Hicks's trailer. Jodie went to bed, but woke up in the night to find Emory gone and \$156 missing from her purse. She believed Emory had taken the money, which upset her because she and appellant had an infant daughter and were short on funds. She told appellant about the theft and continued to pester him about confronting Emory. Jodie said she finally persuaded appellant to find Emory after work on April 21. She said appellant came home an hour later with \$47 and looking as though he had been in a fight. He had blood on his hands and clothes. Jodie testified it was days later when they learned that Emory had died. Appellant told her that Emory had pulled a knife on him and that he struck Emory once in the head with a piece of rebar.

When appellant was arrested, the tennis shoes he was wearing were confiscated. Blood that matched Emory's DNA profile was found on the left tennis shoe. The lighter recovered from the crime scene also had Emory's blood on it.

Dr. Frank Peretti, an associate medical examiner, testified that Emory sustained six blunt-force trauma wounds to the head, any one of which were capable of causing death. He

said the wounds were inflicted with an instrument that had a long, flat surface that was consistent with a piece of rebar. In particular, striations typical of rebar could be seen on one of the wounds. Dr. Peretti stated that blows struck by a rock caused crushing-type injuries that were not present on Emory's head, and that it was unlikely Emory was beaten with a rock. There were no defensive wounds on Emory's body.

In his testimony, appellant disputed his wife's assertion that Emory had stolen money from her purse. He said that Jodie did not own a purse and that the \$47 he gave her that evening was money he had borrowed from his mother. Appellant admitted killing Emory but claimed he did so in self-defense. He further testified as follows. On the afternoon in question he had gone to a bar called Three Card Charlie's to have a beer. There, he saw Emory who asked for a ride to Amity. Appellant said Emory was behaving strangely and told him to stop on Faulkner Circle. Once appellant pulled over, Emory brandished a knife with a six-inch blade and demanded money. Emory then took the keys out of the ignition and came after appellant. Emory missed when he tried to stab appellant with the knife, whereupon appellant picked up a rock and hit Emory until he fell to the ground. Appellant said he did not believe that he had killed Emory. He reclaimed his keys and took Emory's knife, which he threw into a ditch on Longbeach Drive.

The jury in this case was instructed under both subsections (1) and (2) of Ark. Code Ann. § 5-10-103 (Repl. 2006). Pursuant to the statute, a person commits murder in the second degree if: (1) he knowingly causes death of another person under circumstances

manifesting extreme indifference to the value of human life; or (2) with the purpose of causing physical injury to another person, he causes the death of any person. The jury was also instructed on the defense of justification. Arkansas Code Annotated section 5-2-607(a)(2)(Repl 2006) provides that a person is justified in using deadly force if he reasonably believes that the other person is using or is about to use unlawful deadly physical force. One who asserts the defense of justification for a homicide must show not only that the person killed was using deadly physical force, but that he responded with only that force which was necessary and that he could not have avoided the killing. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Diggs v. State*, 93 Ark. App. 332, ____ S.W.3d ____ (2005). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003). When reviewing a challenge to the sufficiency of the evidence, we consider all the evidence, including that which may have been inadmissible, in the light most favorable to the State. *Fondren v. State*, 364 Ark. 498, ____ S.W.3d ____ (2005).

Appellant contends that the evidence is not sufficient because it was shown that he acted in self defense. We disagree. Despite appellant's assertion that he had not meant to kill Emory, the evidence shows that Emory was brutally murdered. He suffered six lethal

blows to the head that caused massive hemorrhaging . These injuries were consistent with having been inflicted with a piece of rebar, not a rock as appellant claimed. The jury may consider and give weight to any false and improbable statements made by an accused in explaining suspicious circumstances. *Eaton v. State*, 96 Ark. App. 78, ____ S.W.3d ____ (2007). Likewise, the jury is not required to believe any witness's testimony, especially that of the accused, because he is the person most interested in the outcome of trial. *Mitchem v. State*, 96 Ark. App. 78, ____ S.W.3d ____ (2006). The jury in this case obviously rejected appellant's version of events, as was its prerogative. We hold that there is substantial evidence supporting the verdict.

Appellant's second argument is that the trial court erred in admitting into evidence a gruesome photograph showing a frontal view of Emory's head covered in blood that was taken at the crime scene. Appellant contends the autopsy photographs were sufficient to demonstrate the victim's injuries and that the admission of this photograph served no useful purpose other than to inflame the jury.

The admission of photographs is a matter left to the sound discretion of the trial court. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001). The mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003). Even the most gruesome photographs may be admissible if they tend to shed light on any issue, are useful in enabling a witness to testify more effectively or by corroborating testimony, or by enabling jurors to better understand the

testimony. *Id.* Other acceptable purposes are to show the condition of the victim's body, the probable type or location of the injuries, and the position in which the body was discovered. *Barnes v. State, supra.* Pictures may also be helpful to show the savagery of the attack on the victim. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003). Absent an abuse of discretion, we will not reverse a trial court for admitting photographs into evidence. *Barnes v. State, supra.*

Here, the photograph was the only one taken at the crime scene of Emory's face. It graphically demonstrated the amount of blood loss resulting from his injuries, and it was offered, in part, to rebut appellant's suggestion that any of the rocks found at the crime scene, which only had traces of blood on them, were used to inflict Emory's injuries. We find no abuse of discretion.

Appellant's remaining assignment of error concerns the denial of his motion in limine to prohibit his wife from testifying about confidential communications he made to her about the murder, pursuant to the husband-and-wife privilege. Rule 504(b) of the Arkansas Rules of Evidence provides that an accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse. However, Ark. R. Evid. 510 provides that a person upon whom the privilege is conferred waives the privilege if he voluntarily discloses or consents to disclosure of any significant part of the privileged matter. Thus, if the same information protected by privilege is disclosed to a third person, the privilege is waived. *Barrett v. State*, 354 Ark. 187, 119

S.W.3d 485 (2003); *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999). The trial court in this instance allowed Mrs. Hick's testimony under Rule 510, ruling that appellant waived the privilege because he had told Michael Burch about the murder.

Appellant argues that he did not effectively waive the privilege by divulging information about the murder to Burch because his disclosure was not voluntary and was made while he was intoxicated. In making this argument, he relies on Ark. R. Evid. 511, which states that a claim of privilege is not defeated by a disclosure which was compelled erroneously or made without the opportunity to claim the privilege. Appellant did not make this argument below; thus he is precluded from raising it for the first time on appeal. *Flowers v. State*, 92 Ark. App. 337, 146 S.W.3d 392 (2005).

Affirmed.

VAUGHT and MILLER, JJ., agree.